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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES RAYMOND, *et al.*,

Plaintiffs,

-v-

MID-BRONX HAULAGE CORP., *et al.*,

Defendants.

No. 15-cv-5803 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

Plaintiffs James Raymond, Mark Lee, and Joseph Lillard bring this action against their employers, Mid-Bronx Haulage Corporation ("Mid-Bronx") and Arnold Sirico, alleging that Mid-Bronx improperly withheld overtime and other compensation as required by federal and state wage and hour laws. Now before the Court is Defendants' motion to compel arbitration of Plaintiffs' claims and dismiss the complaint. For the reasons that follow, the motion is DENIED.

I. Background

Plaintiffs, all current and former employees of Mid-Bronx, initiated this action on July 23, 2015, bringing claims for failure to pay overtime compensation in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 207 and 216(b), New York Labor Law ("NYLL") § 663, and New York Codes, Rules and Regulations ("NYCCR") § 142–2.2. (Doc. No. 1.) Plaintiffs amended their complaint on August 25, 2015 (Doc. No. 8) and on January 5, 2016 (Doc. No. 23), and Defendants answered the second amended complaint on January 15, 2016 (Doc. No. 25). The parties then proceeded to discovery, which concluded on May 20, 2016. (Doc. No. 29.)

On July 22, 2016, Defendants filed a motion for summary judgment on the grounds that (1) Defendants are exempt from the overtime requirements of the FLSA, NYLL, and NYCCR because they fall within the Motor Carrier Act Exemption to the FLSA, and (2) Sirico is not an employer for the purposes of the FLSA, NYLL, or NYCCR. (Doc. No. 51.) Plaintiffs opposed the motion and, for their part, requested that the Court sanction Defendants for alleged discovery abuses in violation of Federal Rules of Civil Procedure 26(a) and 30(b)(6). (Doc. No. 57.) On March 31, 2017, the Court denied Defendants' motion for summary judgment and granted in part and denied in part Plaintiffs' motion for sanctions. (Doc. No. 75.) In a separate order issued the same day, the Court set a trial date of May 30, 2017. (Doc. No. 74.)

On April 14, 2017, Mid-Bronx entered into a Memorandum of Agreement ("MOA") with the union that represents Mid-Bronx employees, Local 813 International Brotherhood of Teamsters (the "Union"). The MOA extended the previous collective bargaining agreement between the parties and added language mandating the arbitration of claims under the FLSA and NYLL. (Doc. No. 86-2.) The relevant portion of the MOA states:

> [A]ny disputes concerning or relating to an employee's wages and hours, including claims made pursuant to the Fair Labor Standards Act and the New York Labor Law shall also be subject to the grievance and arbitration procedure contained [in the collective bargaining agreement]. There shall be no right or authority for any of the above claims to be arbitrated on a class action basis. All such claims contained in this Article shall be subject to the grievance and arbitration procedure as the sole and exclusive remedy for violations for all current employees, as well as past employees. Arbitrators shall apply appropriate law in rendering decisions based upon applicable law and regulations. Notwithstanding any language herein to the contrary, the parties agree to arbitrate any and all disputes in accordance with the rules of the American Arbitration Association.

(*Id.*) On May 9, 2017, Defendants filed the instant motion to compel arbitration, arguing that the MOA is binding on all employees, past and present, even for causes of action that predate its adoption. (Doc. No. 85.) Plaintiffs filed their opposition on May 16, 2017 (Doc. No. 102), and Defendants filed a reply brief on May 19, 2017 (Doc. No. 105).

II. Legal Standard

Arbitration is a matter of contract, and parties may be forced to arbitrate a dispute when they have previously agreed to arbitration. *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). To determine whether a dispute is arbitrable, therefore, a court must decide two questions: "(1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001) (quoting *Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996)). In accordance with the Federal Arbitration Act ("FAA"), "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

Federal policy strongly favors arbitration, and a waiver of a right to arbitrate is not lightly inferred. *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968). Nevertheless, a party may be deemed to have waived its right to arbitration "when it engages in protracted litigation that prejudices the opposing party." *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir. 2000) (quoting *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997)). Although "[t]here is no bright-line rule . . . for determining when a party has waived its right to arbitration," courts consider such factors as "(1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice." *Id.* at 163 (quoting *PPG Indus., Inc.*, 128 F.3d at 107–08). "The key to a waiver analysis is prejudice." *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) (per curiam). Prejudice may occur when "a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense." *Thyssen*, 310 F.3d at 105 (quoting *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)). In sum, "prejudice as defined by our cases refers to the inherent unfairness – in terms of delay, expense, or damage to a party's legal position – that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997). However, "[i]ncurring legal expenses inherent in litigation, without more, is insufficient evidence of prejudice to justify a finding of waiver." *PPG Indus., Inc.*, 128 F.3d at 107.

III. DISCUSSION

Before entering into the MOA, Mid-Bronx and the Union entered into a collective bargaining agreement with an effective date of December 1, 2005 through November 30, 2008 (Doc. No. 54-1 (the "First CBA")), which was later extended through a memorandum of agreement covering the period of November 30, 2008 through April 1, 2010. (Doc No. 54-2.) Mid-Bronx and the Union subsequently entered into a second collective bargaining agreement with an effective date of April 1, 2010 through March 31, 2013 (Doc. No. 86-1 (the "Second CBA")), which was further extended through a letter agreement until March 31, 2017 (*id.* at 46; Doc. No. 86 ¶ 4). Significantly, both the First CBA and the Second CBA (together, "the CBAs") contain identical arbitration provisions at Paragraph 26 that require disputes between Mid-Bronx and the Union to be submitted to a representative of the other party, and provide that, if the representatives do not reach an agreement, "then any party hereto shall apply to" a panel of arbitrators listed in the CBA. (Doc. Nos. 54-1, 86-1.) The CBAs also provide that the arbitrator's award "shall be final and binding upon the parties and shall be enforceable in any Court of competent jurisdiction." (Doc. Nos. 54-1, 86-1.) The provisions require that "[a]ll grievances concerning a bargaining unit Employee's overtime, vacation, sick leave and holiday claims shall be submitted within ninety (90) days of the time the grievant knew, or should reasonably have know[n] of the grievance," and that "[a]ll Employees shall have ninety (90) days from the date this Agreement is signed to present the type of grievance(s) described . . . above which arose during the term of the prior Agreement." (Doc. Nos. 54-1, 86-1.) Mid-Bronx and the Union were thus subject to the CBAs from December 1, 2005 through March 31, 2017, and the arbitration provisions within the CBAs explicitly apply to disputes regarding employees' overtime, which is the gravamen of Plaintiffs' claims here. Defendants have not argued otherwise, and there is nothing in the MOA that alters this obvious conclusion.[1]

Notwithstanding the existence of the arbitration provisions in the CBAs, Defendants have repeatedly invoked the power of the Court, submitted themselves to its jurisdiction, and used its discovery procedures to their advantage. For example, after negotiating a joint case management plan with Plaintiffs (Doc. No. 15), Defendants attempted to dismiss the complaint in its entirety on the grounds that it failed to allege specific facts regarding Plaintiffs' unpaid work and failed to plead that Sirico is an employer as defined by the FLSA. (Doc. No. 13.) After Plaintiffs amended their complaint (Doc. No. 23) and discovery commenced, Defendants successfully moved the Court to compel a non-party to respond to a subpoena and produce responsive documents. (Doc. Nos. 26, 27.) Defendants then moved the Court to extend the deadline to complete discovery so that they could receive subpoenaed documents from the non-party, depose one of the Plaintiffs, Mark Lee, and serve supplemental interrogatory demands. (Doc. No. 28.) Over the course of discovery, which lasted more than six months, Defendants deposed all three named Plaintiffs and subpoenaed several non-parties for documents. (*See* Doc. No. 45.) After discovery closed, the parties held a settlement conference with a magistrate judge, which was not successful. (*See* June 21, 2016 Minute Entry.) Thereafter, Defendants filed a potentially dispositive motion for summary judgment, but not before asking the Court to extend the deadline to file their motion, which the Court granted. (Doc. No. 43.) Before the motion for summary judgment was fully briefed, Defendants twice requested an extension of the deadline to file their reply brief (Doc. Nos. 64, 66), which the Court ultimately granted (Doc. No. 67).

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[1] Indeed, Defendants were apparently aware of Paragraph 26 at the beginning of this litigation, since their eleventh affirmative defense asserted that "Plaintiffs have failed to exhaust their contractual and arbitral remedies prior to commencing this litigation." (Doc. No. 25 at 8.) However, the mere fact that Defendants referred to the arbitration provision in their answer did not preserve a motion to compel arbitration while Defendants litigated the case: the law in this Circuit is clear that for a party seeking to avoid waiver, "it is not enough merely to assert a right without taking appropriate steps to secure it." *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993).

With regard to the first two *PPG Industries, Inc.* factors – "the time elapsed from commencement of litigation to the request for arbitration" and "the amount of litigation (including any substantive motions and discovery)" – the nearly two years of litigation described above, which included multiple dispositive motions, requests for extensions, and use of the full suite of discovery tools available in federal court, is precisely the kind of "protracted litigation . . . that results in prejudice to the opposing party" and justifies a finding of waiver. *Kramer*, 943 F.2d at 179. For example, in *Technology in Partnership, Inc. v. Rudin*, the Second Circuit upheld the district court's finding of waiver when the defendant first raised its contractual right to arbitrate after 15 months of litigation, two fully briefed motions to dismiss, and extensive discovery. 538 F. App'x 38, 39 (2d Cir. 2013). Similarly, in *Com-Tech Associates v. Computer Associates International, Inc.*, the Second Circuit held that a party waived its right to arbitration by engaging in pretrial discovery, making a summary judgment motion, and litigating for 18 months before moving to compel arbitration four months before trial was scheduled to begin.

938 F.2d 1574, 1576–77 (2d Cir. 1991); *see also S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 82 (2d Cir. 1998) (upholding finding of waiver after the parties litigated for 15 months, "negotiated and filed a Joint Civil Case Management Plan, resorted to the court to resolve discovery disputes, and participated in two settlement conferences").

As to the third *PPG Industries, Inc.* factor, "proof of prejudice," the fact that – after nearly two years of litigation – Defendants filed a letter notifying the Court of their intention to move to compel arbitration less than two weeks after the Court denied their motion for summary judgment and a mere 36 days before trial was scheduled to commence is more than enough to support a finding of prejudice. *See Thyssen*, 310 F.3d at 105 (prejudice results when "a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense"). What is more, Defendants have invoked the Court's power to compel non-parties to respond to subpoenas and produce documents, an option that would not have been available if they had timely moved to arbitrate. *See Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216–17 (2d Cir. 2008) (arbitration panels are not authorized to compel non-parties to produce documents in advance of a hearing). Since trial is now scheduled to commence in barely two weeks, it is obvious that Plaintiffs would be prejudiced if forced to arbitrate at this point. *See Tech. in P'ship, Inc.*, 538 F. App'x at 40 (prejudice exists when "a party seeking to compel arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims, or delays invoking arbitration rights while the adversary incurs unnecessary delay or expense").

It also bears noting that Defendants' motion here does not appear to be an attempt to realize the advantages of arbitration, which "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). Rather, Defendants' motion to compel arbitration smacks of opportunism, gamesmanship, and an attempt to take a second bite at the apple. Having failed to prevail on summary judgment, Defendants have resorted to a last-minute tactic designed to secure "a second chance in another forum.'" *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 890 (2d Cir. 1985) (quoting *Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Local Union No. 633 of New Hampshire*, 671 F.2d 38, 43 (1st Cir. 1982)); *see also Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 466 (2d Cir. 1985) ("[A] district judge can recognize the tactics of delay or harassment that operate to prejudice the opposing party and to cause him expense, thereby justifying a finding of waiver."). This the Court will not allow.

IV. CONCLUSION

Given the nearly two years that have elapsed since Plaintiffs' complaint was filed, the extensive discovery and motion practice that has occurred, the fact that the motion to compel arbitration came 36 days before trial was scheduled to commence, and the likelihood that Plaintiffs would be prejudiced were the Court to force them to arbitrate, the Court has little trouble finding that Defendants have waived their contractual right to arbitrate. Accordingly, Defendants' motion to compel arbitration and to dismiss the complaint is DENIED. The parties are reminded that the final pretrial conference in this matter is scheduled to begin at 2:30 p.m. on Friday, May 26, 2017, and that trial is scheduled to commence at 9:30 a.m. on June 12, 2017.

The Clerk of Court is respectfully directed to terminate the motion pending at docket number 85.

SO ORDERED.

Dated: May 24, 2017
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE